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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ARNOLD OSBORN, Plaintiff and Appellant, v. DAVID SAUCEDO, Defendant and Respondent.	B283605 (Los Angeles County Super. Ct. No. VC065370)

APPEAL from a judgment and an order of the Superior Court of Los Angeles, Lori Ann Fournier, Judge. Reversed.

Law Offices of Warren M. Stanton and Warren M. Stanton for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

The parties to this appeal previously shared a landlord tenant relationship. The landlord retook possession of commercial property following an unlawful detainer action. In the current litigation, the former tenant sought to recover alleged trade fixtures and equipment remaining on the previously-leased premises. The trial court found the litigation frivolous and imposed monetary and terminating sanctions. We reverse the sanctions and remand the case to the trial court for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

In February 2016, Arnold Osborn filed a complaint against David Saucedo alleging causes of action for breach of contract, open book account for money due, and "intentional tort." According to the complaint, Osborn leased a portion of Saucedo's premises where he operated a machine shop.[1] Osborn alleged that the lease was verbal; Saucedo does not dispute this allegation. Osborn further alleged that when the lease ended, Saucedo refused to allow Osborn to recover his tools and equipment and Saucedo improperly used Osborn's tools and equipment.

Osborn attached to the complaint a judgment indicating that Saucedo successfully had filed an unlawful detainer action and was entitled to possession of the leased premises.[2] Osborn

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[1] Saucedo disputes this allegation, stating that Osborn ran an auto-body shop, not a machine shop.

[2] The "sole issue in an unlawful detainer proceeding[ ] is possession of the premises." (*Ben-Shahar v. Pickart* (2014) 231 Cal.App.4th 1043, 1053.) Saucedo did not raise res judicata or collateral estoppel as a basis for his motion for sanctions.

alleged he was unable to retrieve the following equipment: three car lifts, 10 "Car Lift Storage," two work area covers, two air compressors, one steel container, one strut installment tool, four work tables, one engine, one spray booth, one 10-ton press, 10 light assemblies, two car rotisseries, two step ladders, one fork lift, one "washer/dryer/propane tank," one first aid kit, restroom supplies, "bath room" tanks, flood control pump, flood control hoses, and two scaffoldings.

In April 2016, Saucedo filed a general denial and asserted several affirmative defenses.

Osborn's counsel hired an attorney to appear at the case management conference. That attorney failed to appear and filed a declaration indicating that the appearance "slipped out of [his] mind" after a distraction and there was no "good excuse" for failing to appear. Then Osborn's counsel failed to appear at a mandatory settlement conference because of a calendaring error.

On February 10, 2017, Saucedo filed a motion for monetary and terminating sanctions under Code of Civil Procedure section 128.7.[3] He stylized it as a "discovery motion." Saucedo argued that Osborn had been evicted and owed over $10,000 in rent. According to Saucedo, Osborn refused to remove his belongings from the property despite repeated requests to do so. Saucedo also argued that the equipment that was the subject of Osborn's lawsuit belonged to Saucedo not Osborn. Saucedo contended that the parties had no agreement under which Osborn had the right to remove any items from the formerly-leased premises. Saucedo noted that Osborn had not responded to any discovery requests; Osborn attached copies of these

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[3] Undesignated statutory citations are to the Code of Civil Procedure.

discovery requests. These discovery requests included no proofs of service. Saucedo emphasized that Osborn's counsel failed to attend two hearings. Saucedo sought monetary sanctions against both Osborn and his attorney.

Osborn filed an opposition to the motion for sanctions. He stated that Saucedo refused to allow Osborn to remove trade fixtures, which Osborn describes as equipment "he brought and installed . . . on the . . . premises . . . ." Osborn attached receipts for the purchase of car lifts and a forklift. Osborn's attorney filed a declaration indicating that he never received Saucedo's discovery requests, which as noted above, contained no proofs of service.

The trial court concluded that Osborn's lawsuit was frivolous, explaining: "At the hearing, Defendant argued that Plaintiff is not entitled to recover the tools or equipment that were left on the Premises upon his eviction. Plaintiff has apparently been granted a number of opportunities to recover such 'equipment' and 'tools' from Defendant, but has failed to do so. 'It is well settled . . . that unless there is an express covenant in the lease to the contrary, any improvements constructed on the leased premises are the property of the landlord at the end of the term of the lease.' (*Wolfen v. Clinical Data, Inc.* (1993) 16 Cal.App.4th 171, 178.) Moreover, Plaintiff and Plaintiff 's counsel have exhibited a blatant lack of diligence in the litigation of this case. For instance, counsel for Defendant revealed to the Court that Plaintiff has failed to cooperate with any discovery, and that Plaintiff 's counsel has failed to attend three hearings in this case. Counsel for Plaintiff failed to meaningfully rebut any of Defendant's arguments at the hearing." (Underlining omitted.) In addition to the terminating sanction, the trial court awarded

Saucedo $3,500 in monetary sanctions. The trial court indicated that Saucedo requested sanctions against both Osborn and his attorney, but did not identify who was required to pay the sanctions.

By order, the trial court dismissed Osborn's complaint. We deem the trial court's order to be a judgment of dismissal. (Cf. *Melton v. Boustred* (2010) 183 Cal.App.4th 521, 544 [deeming order sustain demurrer as judgment of dismissal]; *Peake v. Underwood* (2014) 227 Cal.App.4th 428, 450 [implicitly deeming sanctions order to be judgment].)

DISCUSSION

The trial court abused its discretion in awarding sanctions under section 128.7.

1. Background on Section 128.7

Section 128.7, subdivision (b) provides: "By presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading, petition, written notice of motion, or other similar paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met:

"(1) It is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

"(2) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

"(3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

"(4) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief."

Section 128.7 applies only in limited circumstances. It "authorizes trial courts to impose sanctions to check abuses in the filing of pleadings, petitions, written notices of motions or similar papers." (*Musaelian v. Adams* (2009) 45 Cal.4th 512, 514.) Sanctions pursuant to section 128.7 may be imposed when litigation is frivolous. (*Bucur v. Ahmad* (2016) 244 Cal.App.4th 175, 189.) However, "sanctions should not be routinely or easily awarded even for a claim that is arguably frivolous. Courts must carefully consider the circumstances before awarding sanctions." (*Peake v. Underwood*, *supra*, 227 Cal.App.4th at p. 448.) Additionally, monetary sanctions may not be awarded against a represented party for frivolous litigation.[4] (§ 128.7, subd. (d).)

Section 128.7 expressly does not permit sanctions for discovery abuses. Section 128.7, subdivision (g) provides: "This section shall not apply to disclosures and discovery requests, responses, objections, and motions."

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[4] Although the trial court's order does not specify whether Osborn or his counsel was responsible for the monetary sanctions, any award against Osborn as opposed to Osborn's counsel was impermissible under the express language of section 128.7, subdivision (d)(1). (*Burkle v. Burkle* (2006) 144 Cal.App.4th 387, 402.)

Under section 128.7, a motion for sanctions cannot be filed without first serving the motion on the offending party and allowing the offending party 21 days to withdraw the improper pleading. (§ 128.7, subd. (c)(1).)[5] This is known as the safe harbor period. (See, e.g., *Li v. Majestic Industrial Hills LLC* (2009) 177 Cal.App.4th 585, 591.) If a party does not withdraw a frivolous pleading, the trial court may impose sanctions under section 128.7. (*Bucur v. Ahmad*, *supra*, 244 Cal.App.4th at p. 190.) Saucedo's attorney sent Osborn's attorney a letter requesting that he "withdraw his lawsuit." Osborn does not challenge Saucedo's compliance with the safe harbor provision.

We review the sanction award for abuse of discretion. (*Bucur v. Ahmad*, *supra*, 244 Cal.App.4th at p. 190.) "To be entitled to relief on appeal, the court's action must be sufficiently grave to amount to a manifest miscarriage of justice." (*Ibid.*)

2. Section 128.7 Sanctions Were Not Warranted Because the Litigation Was Not Frivolous

A showing that Osborn filed a frivolous complaint would have warranted sanctions. As we shall explain, Saucedo failed to make that showing. No other grounds warranted sanctions

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[5] Section 128.7, subdivision (c)(1) provides in pertinent part: "A motion for sanctions under this section shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). Notice of motion shall be served as provided in Section 1010, but shall not be filed with or presented to the court unless, within 21 days after service of the motion, or any other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected."

under section 128.7 even though the record showed that Osborn's counsel failed to attend two hearings and that Saucedo alleged discovery abuses, albeit for apparently his own unserved discovery requests. That conduct is not sanctionable under the plain language of section 128.7.

We now turn to the critical question: Was the litigation frivolous? "A claim is factually frivolous if it is 'not well grounded in fact' and is legally frivolous if it is 'not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.' [Citation.] In either case, to obtain sanctions, the moving party must show the party's conduct in asserting the claim was objectively unreasonable. [Citation.] A claim is objectively unreasonable if 'any reasonable attorney would agree that [it] is totally and completely without merit.' " (*Bucur v. Ahmad*, *supra*, 244 Cal.App.4th at p. 189.)

If, as Osborn claims, he had an agreement to remove trade fixtures and was prohibited from doing so, the litigation is not frivolous. (*Clark v. Talmadge* (1937) 23 Cal.App.2d 703, 706-707 [after unlawful detainer action pursuant to agreement tenant may remove improvements within a reasonable time after expiration of tenancy]; see also *Cone v. Western Trust & Sav. Bank* (1937) 21 Cal.App.2d 176, 181 [agreement may provide former tenant with the "right of ingress and egress for a limited time and for the limited purpose of removing the property"].) Whether trade fixtures are removeable without injury to the property is "largely a question of fact." (*Beebe v. Richards* (1953) 115 Cal.App.2d 589, 591.)

In his motion in support of terminating sanctions, Saucedo cited to *Bridges v. Cal-Pacific Leasing Co.* (1971) 16 Cal.App.3d 118 for the proposition that provisions of a lease indicating that

trade fixtures belong to the landlord are valid. *Bridges* considered ownership in the context of a lease provision stating that all fixtures would belong to the landlord upon termination of the lease. (*Id*. at p. 122.) Here, the parties dispute whether their oral agreement permitted Osborn to remove property after the lease ended.[6] *Bridges* is not controlling because, at this stage in the proceedings, it is impossible to determine factually whether the parties agreed to allow Osborn to enter the premises after his tenancy ended and whether the parties had agreed that Osborn retained ownership of trade fixtures and equipment.

Relying on *Wolfen v. Clinical Data, Inc.*, *supra*, 16 Cal.App.4th 171, 178, the trial court here concluded that the litigation was frivolous. *Wolfen* states that "unless there is an express covenant in the lease to the contrary, any improvements constructed on the leased premises are the property of the landlord at the end of the term of the lease." (*Id.* at p. 178.) Reliance on *Wolfen* is misplaced because Saucedo did not show that Osborn sought only the return of an improvement constructed on leased premises, the basis of the holding in *Wolfen*. To the contrary, Osborn alleged that Saucedo refused to allow him to retrieve trade fixtures and equipment.

Although there are several disputed issues—such as ownership of the alleged trade fixtures and equipment, the existence of an agreement to allow Osborn to remove the property, whether Osborn was provided an opportunity to remove his property, and whether Osborn could remove the alleged

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[6] Saucedo states "there was never any agreement to remove any property." In contrast, Osborn alleges that the parties agreed that Osborn could remove his property "at the termination of the rental agreement."

equipment without damaging the premises—the record does not support the conclusion that as a matter of law, Osborn's complaint was frivolous. Litigation is not frivolous because parties have disputed issues of fact. (Cf. *Peake v. Underwood*, *supra*, 227 Cal.App.4th at p. 448 [fact that a plaintiff could not overcome a demurrer or survive summary judgment does not warrant imposition of sanctions].) Because the litigation was not frivolous, the trial court erred in imposing sanctions pursuant to section 128.7.

DISPOSITION

We deem the order dismissing the complaint a judgment of dismissal and reverse the judgment. We reverse the trial court's order awarding Saucedo $3,500 in monetary sanctions. The case is remanded to the trial court for further proceedings. Osborn is awarded his costs on appeal.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.